UMBC Securities Sdn Bhd v Tan Chee Aan

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–435 OF 1994
KANG HWEE GEE J
22 NOVEMBER 2000

Securities *— Shares — Failure of client to make payment for shares — Right of stockbroker to force-sell shares — Whether force-selling of shares was legal*

Securities *— Shares — Regulation — Force-sell of shares — Application of Rules and usage of stock exchange — , whether can be varied by agreement of parties*

The plaintiff's claim against the defendant was for the payment of the sum of RM823,079.10 due on contra loss of shares bought on the instruction of the defendant which had to be forced sold when the defendant failed to pay for them by the seventh day following the day of the transaction (T+7). The defendant had signed the 'Account Application for individual' form, which constituted the agreement between the parties. Pursuant to cl 1 in the form, the defendant undertook to abide by the rules and regulations of the KLSE and the Securities Industry Act 1983 ('the Act'). Pursuant to cl (f) of the form, the defendant authorized the plaintiff to deal with all the stocks and/or shares bought for the defendant's account for which the defendant had not paid in any manner deemed fit. The plaintiff had a witness, a Mr Leow, to testify at the trial but the defendant did not call any witness to give evidence. The issues for determination were: (i) whether the plaintiff had carried out the sales of certain shares contained in ABD-4, pp 1–6, without the defendant's instruction; and (ii) whether the sale of certain shares listed in ABD-4, pp 7–16, which were initially purchased on the instruction of the defendant but which had to be forced sold by the plaintiff when the defendant failed to pay for them by the seventh day after the day of transaction was legal as not all the shares were sold immediately on the eighth day (T+8), and thus contravened the KLSE trading regulation pertaining to force selling. The trading regulation in question was the Prescribed Regulations for Selling Out made pursuant to r 8 of the Rules For Trading By Member Companies, in particular sub-reg 3 of FDSS of Members' Circular No 713/1990. Mr Leow testified that the shares were sold on the defendant's instruction and that some shares were sold only after the eighth day of transaction because the defendant had requested for time to pay for them.

Held, judgment to the plaintiff against the defendant and dismissing the counterclaim of the defendant with costs:

(1) Having failed to call any evidence to substantiate his defence, it followed that Mr Leow's evidence must be accepted as evidence that the shares set out in the table ABD-4 pp 1–6 were indeed sold on the instruction of the defendant. The cross examination of

counsel for the defendant failed to elucidate from him that the defendant did not instruct him to sell (see p 416A).

(2) There is no statutory control or for that matter any prohibition or stricture over the force sale of shares by member companies of the KLSE. All that s 9 of the Act injunct upon to ensure due compliance of its directives is on the KLSE as a body corporate and not on its component members such as the plaintiff. One can therefore conclude with some degree of certainty that the act of the plaintiff in selling the shares on dates later than the eighth day of transaction, had not contravened the Act or indeed any law written or otherwise although it may have been in breach of sub-reg 3 (see p 419B–D).

(3) The undertaking of the defendant to abide by the rules and regulations of the KLSE and the Act in cl (a) of the Account Application form necessarily carried a reciprocal obligation on the part of the plaintiff to observe the same rules and regulations that all shares not paid for by the seventh day of transaction would have to be forced sold by the eighth day of transaction. But this does not necessary mean that the parties were not free by consensus to modify the requirements of the rules for their mutual benefit such as to postpone sales to a date when the shares would fetch a higher price. In law the performance of a contract can be varied by the mutual consent of the parties (see p 421D–E) .

(4) The uncontroverted testimony of the plaintiff's witness alone, that the shares were sold only after the eighth day of transaction because the defendant had requested for time to pay for them, provided the necessary evidence that the parties had varied the force sale regulation to the extent that it was perfectly legitimate for the shares to be sold at a date later than after the eighth day (see p 422B).

(5) The conduct of the defendant attracted the doctrine of estoppel on account of the fact that the defendant had not raised any objection whatsoever over the sales of shares by the plaintiff when he was expected to do so if he had not agreed to the sales and in the process influenced the plaintiff to believe that the sales was perfectly regular (see p 422C).

(6) The plaintiff was entitled to rely on cl (f) of the form which authorized it to deal with the shares in any manner it deemed fit to sell them at the appropriate time it deemed fit. Provided the sale was conducted bona fide to recover the loss that the plaintiff may have to incur by the failure of the defendant to pay for them, the sales could not be impeached (see p 422D).

[**Bahasa Malaysia summary**

Tuntutan plaintif terhadap defendan adalah untuk pembayaran jumlah sebanyak RM823,079.10 yang kena dibayar ke atas kerugian

kontra saham-saham yang dibeli atas arahan defendan yang mana harus dijual secara paksa apabila defendan gagal membayar baginya selewat-lewatnya pada hari ketujuh yang berikutan dari transaksi tersebut (T+7). Defendan telah menandatangani borang 'Account Application for individual' yang mana membentuk perjanjian antara pihak-pihak tersebut. Selaras dengan fasal 1 dalam borang tersebut, defendan telah mengakujanji untuk mematuhi kaedah-kaedah dan peraturan-peraturan BSKL dan Akta Industri Sekuriti 1983 ('Akta tersebut'). Selaras dengan fasal (f) borang tersebut, defendan telah membenarkan plaintif untuk berniaga dengan semua stok dan/atau saham-saham yang telah dibeli untuk akaun defendan bagi yang mana defendan masih belum membayarnya dalam apa cara pun yang dianggapkan sesuai. Plaintif mempunyai saksi, seorang bernama Encik Leow, untuk memberi keterangan di perbicaraan tersebut tetapi defendan tidak memanggil sebarang saksi untuk memberikan keterangan. Isu-isu untuk penentuan adalah: (i) sama ada plaintif telah menjalankan penjualan saham-saham tertentu yang terkandung di dalam ABD-4, ms 1–6, tanpa arahan defendan; dan (ii) sama ada penjualan saham-saham tertentu yang tersenarai dalam ABD-4, ms 7–16, yang mana telah pada awalnya dibeli atas arahan defendan tetapi yang mana terpaksa dijual secara paksa oleh plaintif apabila defendan gagal untuk membayar baginya pada hari ketujuh selepas hari transaksi adalah sah kerana bukan semua saham tersebut telah dijual dengan serta-merta pada hari kelapan (T+8), dan dengan itu telah melanggari peraturan perdagangan BSKL berhubung dengan penjualan secara paksa. Peraturan perdagangan yang dipersoalkan adalah Peraturan-Peraturan Tetap Untuk Penjualan Keseluruhan (Prescribed Regulations for Selling Out) yang dibuat selaras dengan k 8 Kaedah-Kaedah untuk Perdagangan oleh Syarikat-Syarikat Ahli, khususnya peraturan-kecil 3 FDSS dari Pekeliling Ahli No 713/1990. Encik Leow telah memberi keterangan bahawa saham-saham tersebut telah dijual atas arahan defendan dan bahawa sebilangan saham-saham telah dijual hanya selepas hari kelapan transaksi kerana defendan telah memohon masa yang lebih lanjut untuk membayar bagi saham-saham tersebut.

Diputuskan, penghakiman kepada plaintif terhadap defendan dan menolak tuntutan balas defendan dengan kos:

(1) Setelah gagal untuk memanggil sebarang keterangan bagi menyokong pembelaannya, maka boleh disimpulkan keterangan En Leow mestilah diterima sebagai keterangan bahawa saham-saham yang dibentangkan dalam jadual ABD-4 ms 1–6 telah sesungguhnya dijual atas arahan defendan. Pemeriksaan balas peguam bagi pihak defendan gagal untuk mendapatkan keterangan daripada beliau bahawa defendan tidak mengarahkan beliau untuk menjual (lihat ms 416A).

(2) Tidak terdapat kawalan berkanun atau dalam hal itu sebarang larangan atau sekatan ke atas penjualan paksa saham-saham oleh

syarikat-syarikat ahli BSKL. Seksyen 9 Akta tersebut diperuntukkan untuk memastikan pematuhan wajar akan arahan-arahan tersebut ke atas BSKL sebagai sebuah badan korporat dan bukan ke atas ahli-ahli komponennya seperti plaintif. Seseorang oleh itu boleh memutuskan dengan sedikit kepastian bahawa perbuatan plaintif menjual saham-saham tersebut pada tarikh-tarikh yang lebih lewat daripada hari kelapan transaksi, telah tidak melanggari Akta tersebut atau sesungguhnya sebarang undang-undang bertulis atau sebaliknya meskipun ianya mungkin melanggari peraturan kecil 3 (lihat ms 419B–D).

(3) Akujanji defendan untuk mematuhi kaedah-kaedah dan peraturan-peraturan BSKL dan Akta tersebut dalam fasal (a) borang Permohonan Akaun semestinya mempunyai kewajipan bersaling di pihak plaintif untuk mematuhi kaedah-kaedah dan peraturan-peraturan yang sama bahawa semua saham-saham yang tidak dibayar sehingga pada hari ketujuh transaksi terpaksa dijual secara paksa pada hari kelapan transaksi. Tetapi ini tidak semestinya bermakna bahawa pihak-pihak tersebut tidak bebas dengan persetujuan untuk mengubahsuai kehendak-kehendak kaedah-kaedah tersebut untuk kepentingan bersama mereka seperti menangguhkan penjualan kepada satu tarikh apabila saham-saham tersebut mendapat harga yang lebih tinggi. Di sisi undang-undang, perlaksanaan sesebuah kontrak boleh diubah menurut persetujuan bersesama pihak-pihak tersebut (lihat ms 421D–E).

(4) Testimoni saksi plaintif sahaja yang tidak bercanggahan, bahawa saham-saham tersebut telah dijual selepas hari kelapan transaksi kerana defendan telah meminta perlanjutan masa untuk membayarnya, merupakan keterangan yang perlu bahawa pihak-pihak tersebut telah mengubah peraturan penjualan paksa sehingga kepada had bahawa adalah amat sah bagi saham-saham tersebut dijual pada satu tarikh yang terkemudian selepas hari kelapan (lihat ms 422B).

(5) Perbuatan defendan membolehkan pemakaian doktrin estopel atas fakta bahawa defendan tidak membangkitkan sebarang bantahan apa sekalipun ke atas penjualan saham-saham oleh plaintif sedangkan beliau sememangnya dijangka akan berbuat sedemikian jika beliau tidak bersetuju dengan penjualan tersebut dan dalam proses itu mempengaruhi plaintif supaya mempercayai bahawa penjualan tersebut adalah sesungguhnya mengikut aturan (lihat 422C).

(6) Plaintif berhak untuk bergantung pada fasal (f) borang tersebut yang mana memberinya kebenaran untuk berurusan dengan saham-saham tersebut dalam apa cara pun yang dianggapkan sesuai untuk menjualnya pada masa yang wajar yang dianggapkan sesuai olehnya. Kecuali jika penjualan tersebut dijalankan secara bona fide untuk memperolehi semula kerugian yang

mungkin telah dialami oleh plaintif akibat kegagalan defendan untuk membayarnya, penjualan tersebut boleh dicabar (lihat ms 422D).]

Notes

For a case on failure of client to make payment of shares, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 784.
For a case on regulation of shares, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 786.

Cases referred to

Berry v Berry [1929] KB 316 (refd)
OSK & Partners Sdn v Tengku Noone Aziz & Anor [1983] 1 MLJ 179 (refd)
Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased) v Cheok Toh Gong & Ors [1996] 1 MLJ 843 (refd)
RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions [1999] 3 SLR 464 (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701 (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (refd)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621 (refd)

Legislation referred to

Companies Act 1965
Securities Industry Act 1983 s 9(8)
Security Industry Act 1973
Stock Exchange (SES) Rules and By Laws [Sing]

Nallini Pathmanathan (*Skrine & Co*) for the plaintiff.
SK Lam (*Manjit Singh Sachdev Mohammad Radzi & Partners*) for the defendant.

Kang Hwee Gee J. : The plaintiff's claim against defendant in this suit is for the payment of the sum of RM823,079.10 due on contra loss of shares bought on the instruction of the defendant which had to be force sold when the defendant failed to pay for them by the seventh day following the day of transaction.

The issues

By the grace of both counsels, much time had been saved in the conduct of this trial. They had sat in conference on a professional basis to identify the issues that ought to go for trial before the court, the findings of which would determine whether the plaintiff would succeed in its claim. In doing so, they

had in turn spared me the tedious task of having to surf the contents of the pleadings in order to mark out the issues.

At the commencement of proceedings, they informed me that only two issues had remained unresolved.

The first relates to the sales of certain shares by the plaintiff which the defendant alleged were carried out without his instructions. These had been set out in a table in an agreed bundle of documents which the parties had labouriously prepared and marked as ABD-4, pp 1–6.

The second relates to the legality of the sale of certain shares which were initially purchased on the instruction of the defendant but which had to be forced sold by the plaintiff when the defendant failed to pay for them by seventh day after the day of transaction (referred to in the industry as 'T+7'). These were also set out neatly in the table ABD-4, pp 7–16.

They agreed that the plaintiff would be entitled to enter judgment in full only if these two issues were resolved in its favour.

The conduct of the trial — witness for the plaintiff

At the trial, only one witness, a Mr Leow Yuen Fong, gave evidence. He was the plaintiff's dealer's representative who dealt directly with the defendant in all the sale and purchase of shares undertaken by the plaintiff on behalf of the defendant.

Refering to the sales of the shares referred to in the table ABD-4 pp 1–6, Mr Leow confirmed that the sales were initiated and transacted on the orders of the defendant before the time for payment was up, that is to say, within the seven days following the day of transaction (T+7) under the KLSE trading rules prevailing at the time.

With respect to the shares listed in ABD-4 pp 7–16, Mr Leow confirmed that these were forced sold by the plaintiff after the defendant failed to pay for them within seven days following the day of transaction (T+7) under the same rules, to which I shall revert to later.

He testified that under the rule, the plaintiff would be at liberty to sell them on the eighth day (T+8). But not all the shares listed in the table pp 7–16 were sold immediately on T+8. This was because the defendant had requested for an extension of time to pay for them, on account of the possibility that they may be sold later at a higher price to minimize his loss. They were sold off not later than a month from the day of the transaction. Mr Leow however, maintained that the plaintiff was under no compulsion then to sell the shares on T+8, as the KLSE did allow its members the leeway to sell them at any time thereafter. He said it was only sometime in April 1994 that the KLSE made it mandatory to sell them on T+8.

The defendant did not call any witnesses to give evidence. He was contented to rely only on the submission of his counsel on the legality of the force sales of the shares which were effected after the T+8 period, an issue which I shall revert to shortly.

Having failed to call any evidence to substantiate his defence, it follows that Mr Leow's evidence must be accepted as evidence that the shares set out in the table ABD-4 pp 1–6 were indeed sold on the instructions of the defendant. The cross-examination of counsel for the defendant failed to elucidate from him that the defendant did not instruct him to sell. That essentially disposes of the first issue.

The second issue — a question of law

That the lots of shares as set out in the table ABD-4 pp 7–16 had to be sold on account of the failure of the defendant to pay for them was not in dispute. What was being disputed by the defendant was the legality of the sales of the shares by the plaintiff not on the eighth day, that is to say on the day immediately after T+7, but after the eighth day.

The sales, it was contended, had contravened the KLSE trading regulations pertaining to force selling, and as such would be enforceable. The plaintiff, it was argued, would therefore not be able to recover the contra loss in respect of these lots of shares from the defendant.

The trading regulation in question was the Prescribed Regulations for Selling-out made pursuant to r 8 of the Rules For Trading By Member Companies as it subsisted then, reads as follows:

> Selling Out In Relation to the FDSS (From sub-reg 3 of FDSS of Members' Circular No 713/1990)
> Member companies shall close-off purchase positions of clients who fail to pay for their purchases by 12:30pm on the seventh market day following the date of contract and shall on an immediate delivery basis institute a selling-out by the eighth day the securities or any of the securities for which the client has not made full payment by the said due date. The member companies may at any time thereafter sue such clients for the difference and all losses and expenses consequent upon such selling-out. It shall not be necessary for member companies to give notice of all such selling-out and all damages which the member companies may sustain shall be recoverable from the clients as liquidated damages.

There could be no doubt that the parties had entered into a perfectly valid brokerage agreement. Its formation was not against public policy. Neither had it offended any law. What is in issue is whether the performance by the plaintiff in not complying with the rule imposed upon it by the KLSE to force sell the shares on the eighth day of transaction had rendered it invalid. To succeed on this ground, the force sale of the shares after the eight day will have to come within that category of performance which is prohibited by statute (that is to say the Securities Industry Act 1983 ('the Act')), so as to render it illegal and unenforceable in law.

To settle this issue, reference may be made first to *Chitty on Contracts* Vol 1 (1999 Ed) at pp 17–147 (footnotes excluded) for the principle that it expounded which I accept as correctly stating the law. It will then be necessary to examine the offending rule or regulation of the KLSE to see if the non-compliance of it by the plaintiff was against public policy or in the extreme whether it offends against statute, in this case the Act.

Chitty at pp 17–147: Illegality through the manner of performance

The question of statutory illegality in a contract generally arises in connection with its formation, but it may also arise in connection with its performance, since the effect of the statute may be to deprive one or both parties of their rights unless the contract is performed in a particular manner, or, to put the matter another way, the manner in which a contract is performed may turn it into the sort of contract that may be prohibited by statute. Thus, the seller of agricultural fertiliser which omitted to give the purchaser an invoice showing the composition of the fertiliser, was held unable to recover its price since the seller had not performed the contract in the only way in which the statute allowed it to be performed. In another case, statutory regulations required that the seller of utility goods should furnish to the buyer an invoice containing certain particulars. The plaintiff made a contract of sale for non-utility goods, to which the regulations did not apply; but he purported to perform it by delivering it to the buyer, without objection, utility garments to which the regulations did apply; and he did not furnish the invoice. The Court of Appeal held that this contract was no less unenforceable than would have been a contract, the initial terms of which provided for the sale of utility garments, and which could only have been lawfully performed by the delivery of the requisite invoice.

Rules and regulations of the KLSE

Despite the impressive name that it carries and the seemingly officious nature of its rules and regulations, the Kuala Lumpur Stock Exchange ('the KLSE') is basically a company incorporated under the Companies Act 1965, much in common with the thousands of others registered with the Registrar of Companies. But unlike them, it is a company approved under the Act to operate 'a stock exchange' and its memorandum and articles of association and the rules and regulations made thereunder are regulated under the Act.

Being a limited company, the exchange is managed by a committee under its articles of association, whose power includes the making of rules and regulations of the KLSE.

Abdoolkader J (as he then was) in the Federal Court case of *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179 at p 184, described at p 186 the status of the KLSE with respect to the previous Security Industry Act 1973, thus:

> In the light of the provisions of the Act and the constating and governing instruments we have referred to and on an application of the principles of law we have adumbrated, it would appear that the exchange is a hybrid corporation — a company incorporated under the Companies Act but recognised and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual elements in relation to its members. It is a statutorily regulated entity under the overall direction and control of the Minister in fundamental respects, thus manifesting a distinctive public element which is reflected

particularly in the requirements of the provisions of s 6(2)(b)(vi) and (c) which prescribe the public interest as the prime consideration.

Section 9 of the current Act enumerates the duties of a stock exchange (such as the KLSE), placing on it the obligation to ensure that the exchange's rules are complied with by its members. Under the same section, amendments to the rules of an exchange, (including the rule requiring its members to force sell referred to earlier) have to be approved by the Securities Commission. In order that the extent of control which the Commission wields over the power of the committee of the KLSE to make rules and regulations may be properly appreciated, it is necessary to set out s 9 in full as follows:

Commission to approve amendment to rules of stock exchange

(1) No amendment to the rules of a stock exchange shall have effect unless it has been approved by the Commission under sub-s (3).

(2) Where a stock exchange proposes to make any amendment to its rules, the stock exchange shall submit to the Commission —

(a) the text of the proposed amendment; and

(b) an explanation of the purpose of the proposed amendment.

(3) The Commission shall, within six weeks after the receipt of any proposed amendment under sub-s (2), give notice in writing to the stock exchange that it approves or disapproves of the proposed amendment or any part of the proposed amendment, as the case may be.

(4) The Commission may, by notice in writing, declare any class of rules of a stock exchange to be a class of rules whose amendments do not require the approval of the Commission under sub-s (3), and accordingly, any amendment to the rules of a stock exchange that belongs to that class shall, subject to sub-ss (5) and (6), have effect notwithstanding that they have not been so approved under sub-s (3).

(5) Where the Commission is of the opinion that any amendment to the rules of a stock exchange made under sub-s (4) does not fall within the class of rules declared by the Commission under that subsection as not requiring its approval, the Commission may, after consultation with the stock exchange, require the stock: exchange to submit such amendment for its approval under sub-s (3).

(6) Where a rule amended by the stock exchange under sub-s (4) is the subject of a requirement made by the Commission under sub-s (5), such amendment shall cease to have effect from the date of the Commission making such a requirement or such later date as the Commission may determine:

Provided that this subsection shall not have effect until a reasonable time has been given to the stock exchange to notify the persons affected by such amendment.

(7) Notwithstanding the provisions of this section, the Commission may, from time to time, after consultation with the stock exchange, by written notice require the stock exchange to amend the rules of the stock exchange in such manner and within such period as may be specified in the notice.

(8) A stock exchange which fails to comply with sub-s (2) or which fails to comply with a requirement made under sub-s (5) or a written notice made under sub-s (7) commits an offence.

(9) A notice under this section may be served personally or by post.

There could be little doubt that the Securities Commission maintains a tight reign on the rule making power of the committee of the KLSE. A failure on the part of the KLSE to comply with the directive of the Commission with respect to the amendment of rules of the exchange exposes the KLSE to prosecution under s 9(8) of the Act. This notwithstanding, there is no statutory control or for that matter any prohibition or stricture over the force sale of shares by member companies of the KLSE. All that s 9 of the Act injuncts upon to ensure due compliance of its directives is on the KLSE as a body corporate and not its component members such as the plaintiff. One can therefore conclude with some degree of certainty that the act of the plaintiff in selling the shares on dates later than the eight day of transaction, had not contravened the Act or indeed any law written or otherwise, although it may have been in breach of sub-reg 3.

In fact, the Federal Court had ruled (in a case which involved the formation of a contract rather than its performance as in the instant case) in *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253, that share transactions executed through an unregistered remisier, was perfectly valid although it involved a more serious breach of the rules and regulations of the KLSE then subsisting. The court struck down the argument that such a contract was illegal and that it should not lend its hand to a plaintiff to enforce a contract which had contravened the rules of the exchange. It held (per Gill CJ, Ali and Ong Hock Sim FJJ concurring) that:

> Not being registered as a remisier is not contrary to public policy because the by laws of the Stock Exchange are the by laws of a private body which have no force of law. They are binding on the plaintiffs but not on the defendants. If the plaintiffs were dealing with an unregistered remisier, they were committing a breach of by law 97 of the Stock Exchange Rules which provides for a penalty. But their dealing with such a remisier did not make such a contract illegal as being opposed to public policy.

The case was applied more recently by the Court of Appeal in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621, in a yet more serious breach which offended against s 84 of the Act relating to false trading and market rigging, where the court appeared to have held that even in such an instance, no such contract may be invalidated on grounds of public policy.

The ruling in *Theresa Chong* had also been followed across the causeway in *RHB – Cathay Securities Pte Ltd v Ibrahim Khan and other actions* [1999] 3 SLR 464 at p 478, wherein it was held by the High Court Singapore that share dealings transactions conducted in breach of the plaintiff's obligation under the Singapore Stock Exchange (SES) Rules and By Laws to exercise proper supervision over its dealer would not render them void or illegal on

the ground of public policy. The breach had merely exposed the plaintiff to being penalized by the SES.

The terms and conditions agreed to between the parties

Having found that the performance of the agreement by the plaintiff in selling the shares after the eighth day of transaction has not been rendered unenforceable under any statute, it follows that the issue has to be resolved by the terms and conditions written or implied which have been agreed to by the parties.

That the defendant had signed the 'Account Application for individual' form (ABD-1 pp 204–205) is now conceded. The completed form signed by both the parties therefore constituted the agreement by which they had agreed to be bound. In order that the contractual commitment made by the defendant may be understood, it is necessary that I set out *in extenso* the clauses as they appear in the form:

> By signing below, I …
>
> (a) request you to open an Account in UMBC Securities Sdn Bhd ('UMBCS') and undertake to abide by the Rules and Regulations of the Kuala Lumpur Stock Exchange and the Securities Industry Act;
>
> (b) undertake to make immediate payment against delivery of stock and/or shares purchased on my behalf. I undertake to pay the amount of deposits required by you on purchase contract made on my behalf. The balance of which (if any) will be paid immediately on delivery of stocks and/or shares or as requested by you;
>
> (c) undertake to deliver promptly any stocks and/or shares you may have sold on my behalf and hereby authorize you to deduct from my account with you and/or the proceeds from the sale of the aforesaid such sum or sums equivalent to the entitlement or rights pertaining to the aforesaid in his/their name(s) in time for the entitlement and/or rights pertaining to the aforesaid stock and/or shares;
>
> (d) hereby authorize you to sell out or buy in such stocks and/or shares as may be required to clear my position with you and I undertake to indemnify you against all losses in such events should I fail to comply with paras (a), (b) and (c) above. You may offset any amount outstanding due to you from my sales proceed or contra gain or withhold the release of shares (in custody or registration) pending clearance of my dues;
>
> (e) agree to pay you late payment charges at the rate to be determined by you from time to time plus handling and service charges on the settlement on my part;
>
> (f) authorize you to deal with all the stocks and/or shares bought for my account for which I have not paid in any manner you deem fit;
>
> (g) declare that the proof of posting by ordinary mail by you to me of the contract note, contra statement and/or other documents to me shall be deemed to have been duly received by me in the ordinary course of post;
>
> (h) hereby irrevocably authorize you to release any stocks and/or shares purchased by me to the remisier or any authorized representatives;

(i) declare that Malaysian law shall govern the relationship between the applicant and UMBCS as client and stockbroker, respectively and, as between the applicant and UMBCS, all transactions effected by UMBCS in pursuance thereto. The applicant agrees to submit to the non-exclusive jurisdiction of the courts in Malaysia in the event the applicant is not a resident in Malaysia;

(j) declare that all orders made through the telephone shall be deemed to be confirmed;

(k) the acceptance and continuance of this account shall be entirely at the discretion of the company;

(l) authorize the company to verify and exchange information contained in this application form and any such information relating to the applicant's particulars, bank account(s) between UMBCS and such other third parties as may be deemed appropriate for the purpose of approving this application and for such other purpose as long as the applicant shall remain a client of the company;

(m) declare that the information given herein is true and correct.

The undertaking of the defendant to abide by the Rules and Regulations of the KLSE and the Act in (a) above necessarily carries a reciprocal obligation on the part of the plaintiff to observe the same rules and regulations that all shares not paid for by the seventh day of transaction would have to be forced sold by the eighth day of transaction. But this does not necessarily mean that the parties were not free by consensus to modify the requirements of the rules for their mutual benefit such as to postpone sales to a date when the shares would fetch a higher price. In law, the performance of a contract can be varied by the mutual consent of the parties (*Berry v Berry* [1929] KB 316). Thus, in *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased) v Cheok Toh Gong & Ors* [1996] 1 MLJ 843, the Supreme Court in finding that the parties to a contract for the sale of land could vary the term of a contract requiring a written notice to be served to complete the sale by the giving of an oral notice, held (per Peh Swee Chin SCJ) at p 853:

> In the first place, both parties to an agreement are entitled to vary any term of the agreement in writing, or orally, where oral evidence of such variation can of course be given, to quote s 92(d) of the Evidence Act 1950, 'save in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to registration of documents'. The above agreement is not of those excepted cases.
>
> It is important to remember that when it is sought to prove a variation, not by an express agreement but by a course of conduct, that both parties have understood the variation and intended to be bound by it. In the instant case, the variation in question was sought to be proved by a course of conduct, vide the evidence set out earlier, and the court would have to be satisfied that the variation to cl 3 in question was both understood by the purchaser and the vendors, and that they all intended to be bound by it. What the court would have to be so satisfied would depend on the surrounding circumstances.

The plaintiff, in the instant case would only be contractually obligated to sell the shares on the eighth day in strict compliance of the rules of the KLSE, if and only if the parties had intended all along in the course of their dealings that all the shares that had not been paid for by the seventh day must be force sold on the eighth day without exception — in which case the plaintiff would be committing a breach by selling them after the eighth day.

The uncontroverted testimony of the plaintiff's witness, Leow Yuen Fong, alone that the shares were sold only after the eighth day of transaction only because the defendant had requested for time to pay for them, provides the necessary evidence that the parties had varied the force sale regulation to the extent that it was perfectly legitimate for the shares to be sold at a date later than after the eighth day. But, even discounting Leow's evidence, the conduct of the defendant attracts the doctrine of estoppel as restated by the Court of Appeal in *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 — on account of the fact that the defendant had not raised any objection whatsoever over the sales of shares by the plaintiff when he was expected to do so if he had not agreed to the sales and in the process influenced the plaintiff to believe that the sales were perfectly regular.

Additionally, the plaintiff was entitled to rely on cl (f) which authorized it to deal with the shares 'in any manner you deem fit' to sell them at the appropriate time they deemed fit. Provided the sale was conducted bona fide to recover the loss that the plaintiff may have to incur by the failure of the defendant to pay for them, the sales could not be impeached.

The plaintiff is entitled to enter judgement as prayed. The counterclaim of the defendant for losses suffered by reason of the forced sale must accordingly be dismissed with costs.

Judgment to the plaintiff against the defendant and defendant's counterclaim dismissed with costs.

Reported by Moy Saw Han